81096-6

NO. 81096-6

SUPREME COURT OF THE STATE OF WASHINGTON

NO. 58004-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CHARLES MOMAH,

Petitioner.

AMENDED PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Charles Momah asks this Court to accept review of the Court of Appeals decision affirming his conviction and sentence.

II. COURT OF APPEALS DECISION

A copy of the decision is attached as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

1. The trial court held a full day of voir dire behind closed doors – part of it in chambers, and part of it in the adjacent jury room – without any findings to justify courtroom closure. The appellate court affirmed, holding that voir dire occuring in chambers with the door "closed," as the transcript states, is not "closed" in the constitutional sense and hence does not trigger the need for a Bone-Club[1] or Press Enterprise[2]-type analysis.

(a) Does the appellate court's decision that in-chambers voir dire is not "closed" in the constitutional sense conflict with two published decisions from Division III – State v. Frawley, 140 Wn. App. 713, 167 P.3d 593 (2007) and State v. Duckett, No. 25614-6-III, 2007 Wash. App. LEXIS 3158 (2007) – as well as decisions from the sister states and federal courts, holding that in-chambers voir dire is presumptively closed and does trigger the need for a Bone-Club or Press Enterprise-type analysis?

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[1] State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995).

[2] Press-Enterprise Co. v. Superior Court of California (Press-Enterprise I), 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984).

(b) Does the appellate court's decision to uphold closure based on a subjective analysis of the trial judge's decision – i.e., that he sought to avoid juror contamination rather than to keep the proceedings secret – conflict with controlling cases applying an objective test, instead, to determine the constitutionality of such closure?[3]

(c) Does the appellate court's decision to uphold closure on the ground that there was no formal order of closure or proof on the record that any member of the public or press was excluded, conflict with Brightman, 155 Wn.2d 506, 512-13 (reversing due to courtroom closure even though "there is no evidence that the court enforced its ruling, there is no record of a written order, and there is nothing else in the record indicating that anyone was denied access to the courtroom") and Orange, 152 Wn.2d 795, 807-08 (looking solely to transcript, presuming that closure was effective, and eschewing reliance on results of evidentiary hearing to determine whether any person had actually been kept out of the voir dire proceedings)?

(d) Does the appellate court's decision conflict with Orange,

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[3] Press-Enterprise I, 464 U.S. 501; In re Orange, 152 Wn.2d 795, 100 P.3d 291 (2004) (courtroom closure for voir dire constitutes reversible error despite the fact that it was done for overcrowding and possible security reasons rather than specifically to keep proceedings secret); State v. Brightman, 155 Wn.2d 506, 122 P.3d 150 (2005) (courtroom closure during voir dire constitutes reversible error even though it was done to avoid possible "security" issue rather than to keep proceedings secret); State v. Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006) (courtroom closure constitutes reversible error, despite the fact that it was done to allow one codefendant's counsel to speak more freely rather than to keep proceedings secret from the press or public).

which treated the portion of voir dire conducted in chambers as being just as closed as the portion of voir dire that was conducted in the closed courtroom (Orange, 152 Wn.2d 795, 801, 812, & Ireland, J., dissenting at 828)?

2. Although the trial court admitted evidence that Dr. Momah touched other patients in a sexual manner, it excluded evidence that Ms. Phillips – the alleged victim of nonconsensual sex charged in Count 1 – touched other doctors in a sexual manner. Did exclusion of such evidence based on the rape shield law – even though it was probative of bias and motive – violate ER 404(b) and the right to present a complete defense?

3. The evidence that Dr. Momah touched other patients inappropriately concerned different patients, at different, remote, times, and different acts (no claims of rape, and one who claimed no bad *act* at all, just words). Was this irrelevant and prejudicial under DeVincentis[4]; given post-DeVincentis scholarship criticizing it, must that decision be revisited; does admission violate the Hudlow[5] rule that such prior acts have virtually no probative value; and does admission of such propensity evidence violate Due Process Clause protections?

4. Count 1, third-degree rape, alleged sexual intercourse and the only disputed issue was consent. The other counts charged inappropriate

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[4] State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003).

[5] State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983).

touching of different patients, at different times, which Dr. Momah denied. Did denial of the motion to sever Count 1 violate CrR 4.3, CrR 4.4, and the right to a fair trial?

5. Ms. Burns – the complainant on Count 4, second-degree rape – violated two court orders by blurting out inadmissible, prejudicial, evidence. Does the appellate court's decision to affirm anyway conflict with State v. Escalona[6] and the Due Process Clause?

6. Newly discovered evidence shows that the lawyer for the complainants played a significant, prejudicial, and sanctionable role in orchestrating complainants, and even suborning their perjury. Does the state's failure to disclose this conduct warrant a new trial under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)?

IV. STATEMENT OF THE CASE

A. Heather Phillips Alleges Rape on August 12, 2003

On August 12, 2003, Heather Phillips – a patient of gynecologist Dr. Momah – claimed that she needed emergency morning-after contraception. She called Dr. Momah three times and asked him to stay late and meet her, after hours, at his office. He agreed. 10/25/05 VRP:41-43; 146-67.

[6] State v. Escalona, 49 Wn. App. 251, 742 P.2d 190 (1987).

There was disputed evidence about whether they had had a prior sexual relationship and about whether Dr. Momah would naturally consider her telephone call for an after-hours meeting, alone, without staff, as an invitation for a likely sexual liaison. Id. (Phillips' testimony); 11/5/05 VRP:20-49 (Momah testimony). But there was no dispute that they met at his closed office, after hours, at her request, that he examined her, and that he gave her the requested medication – for not just contraception, but also Percocet and Valium. Id., VRP:152.

There was also no dispute that he had sex with her on the examining room table. Dr. Momah said it was consensual. 11/5/05 VRP:20-49. Ms. Phillips said it was not. 10/25/05 VRP:41-43; 146-67.

She left his office, filled her prescriptions for Percocet and Valium but notably not for the contraceptive, and told her boyfriend that she had been raped. She then went to the emergency room. Their exam confirmed that she had had sex with Dr. Momah, a matter that he did not dispute. 10/25/05 VRP:170-85. But it showed no signs of vaginal trauma or bruising, and Phillips denied injuries – remarkable given Momah's large size.[7] Phillips appeared extremely upset, though, and obtained morphine at another hospital later that night. Id., VRP:177-78.

[7] 10/31/05 VRP:76-82.

B. The Publicity Against Dr. Momah Spotlights Plaintiff's Lawyer Mr. Bharti, Who Attracts Numerous Patient-Clients

The police investigated Phillips' allegations and Phillips contacted an attorney of her own. She also went on television (with her face shadowed) and publicized the allegations. 10/25/05 VRP:191.

Plaintiff's lawyer Harish Bharti quickly became the center of publicity for all allegations against Dr. Momah.[8] Bharti filed scores of lawsuits against Momah seeking money damages. Almost all of the complainants in this case – victims of the charged counts as well as the ER 404(b) complainants –called Bharti their lawyer.

C. The State Files Charges

Four of those patients became the focus of criminal charges against Dr. Momah. Counts 2-4 charged two counts of indecent liberties and one count of second-degree rape, for allegedly touching patients inappropriately during examinations. CP:421-22. Count 1, however, charged a crime of a different nature, that is, sexual intercourse with Ms. Phillips without consent. Id.[9] Three additional complainants became the "ER 404(b)" witness.

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[8] E.g., 10/18/05 VRP:50-53 (Shelly Siewert learned about the allegations because of media coverage; she did not call the police, but called Bharti).

[9] Three additional counts alleged violations of the Health Care False Claims Act, but they were severed before trial.

Dr. Momah denied Counts 2-4 completely. 11/2/05 VRP:120-47 (Burns); 148-61 (Siewert); 11/7/05 VRP:189-203 (Burnetto). Regarding Count 1, however, he testified that the after-hours sex was consensual. 11/5/05 VRP:20-49.

We incorporate by reference the summary of the testimony from the Opening Brief, pp. 8-20. Basically, the state was permitted to introduce extensive evidence of Momah's supposedly sexualized conduct with his other patients; the defense, in contrast, was barred from introducing the same sort of evidence of Phillips' prior sexualized conduct with her former doctors to gain drugs or other advantages from them.

V. ARGUMENT IN FAVOR OF REVIEW

A. The Courtroom Closure Decision Conflicts With Decisions of this Court, of Division III, and of Other Jurisdictions, on (1) Whether In-Chambers Questioning is Closed, (2) Whether the Judge's Subjective Intent Rather than Objective Facts Count, and (3) Whether Evidence Outside the Record is Necessary to Prove that Closure Was Carried Out

On October 11, 2005, the trial court adjourned to chambers – a "closed" back room – for individual questioning of jurors. 10/11/05 VRP:19. According to the transcript, this began first thing in the morning and lasted until the end of the court day in the late afternoon. Id., VRP:19. ("At this time the Court and counsel adjourned to chambers.") According

to both the judge and the court reporter, it was in "chambers," with the door "closed," and with no one but the defendant, counsel, the court, and court reporter present. Id., VRP:19-20. ("THE COURT: We have moved into chambers here. *The door is closed.* We have the court reporter present, as well as all counsel and the defendant, along with the Court and juror number 36.") (emphasis added).

Each time a juror came in for individual questioning or left, he or she came in or left through that closed door. E.g., id., VRP:26 ("At this time, Juror Number 2 left chambers."); VRP:32 ("At this time Juror Number 7 entered chambers."); VRP:59 ("At this time Juror Number 19 entered chambers.").

The lunch break was taken. Id., VRP:104. They resumed behind closed doors in the afternoon, this time in the jury room, but still using it as a closed room. Id., VRP:106. The judge explicitly stated who came back to that closed room to which they "adjourn[ed]," and it was not the press or the public: "With that, we are going to adjourn back into the jury room, the lawyers, the defendant, and the court reporter." Id. Individual jurors came in one at a time and then left. E.g., VRP:107. It lasted that way until the very end of the court day, approximately 3:10 p.m. Id., VRP:141.

The court reporter scrupulously recorded each person who entered

or left all day long, and no member of the public or the press was listed.

The appellate court began with the general rules that a closed hearing violates the right to a public trial[10] whether or not the defendant consents,[11] and that the right to a public trial extends to voir dire.[12] It agreed that before a judge may close a courtroom, four prerequisites must be satisfied concerning the "overriding interest" in closure, the limits of and alternatives to closure, and "findings adequate to support the closure" (Waller v. Georgia, 467 U.S. 39, 48; In re Orange, 152 Wn.2d 795), and that none of those steps occurred in this case.

The appellate court avoided the conclusion that failure to take these steps required reversal for three reasons: (1) because in-chambers questioning is not "*closed*" in the constitutional sense; (2) because the trial judge's *subjective intent* was not to keep matters secret from the press or public; and (3) because the transcript did not show a specific order of exclusion or whether any named member of the public was excluded.

Each holding conflicts with controlling authority.

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[10] Waller v. Georgia, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984).

[11] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) ("We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment ... .") (Court reaches result under Fourteenth Amendment, also).

[12] See Press-Enterprise I, 464 U.S. 501 (voir dire); In re Orange, 152 Wn.2d 795; State v. Brightman, 155 Wn.2d 506.

1. Conflict With Division III And Numerous Out-of-State Courts on Whether In-Chambers Voir Dire is "Closed" in the Constitutional Sense

The appellate court's decision that voir dire held in chambers is not "closed" in the constitutional sense conflicts with two recent decisions from Division III – State v. Frawley, 140 Wn. App. 713, and State v. Duckett, 2007 Wash. App. LEXIS 3158. As the appellate court in Momah frankly stated, "Dr. Momah also relies on a recent case from Division Three, State v. Frawley [for the argument that in-chambers voir dire is closed in the constitutional sense]. We decline to follow that case." Momah, at 12.[13]

The appellate court's decision that voir dire in chambers is not "closed" also conflicts with prior Washington decisions that treat "chambers" conferences as private or closed.[14] It contradicts the

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[13] Similarly, Div. III confirmed in Duckett, "Here, as in Frawley, the trial court conducted a portion of voir dire in chambers without engaging in the necessary Bone-Club analysis. This requires reversal, and the remedy is a new trial." Duckett, 2007 Wash. App. LEXIS 3158 at *5.

[14] As we explained in the Opening Brief, this assumption is so ingrained that it has not come up as a disputed issue – but the cases that discuss chambers proceedings always characterize them as closed. E.g., Federated Publications, Inc. v. Kurtz, 94 Wn.2d 51, 59, n.3, 615 P.2d 440 (1980) (equating "chambers conferences" with closed courtroom: "amici ... contend that a literal interpretation of section 10 would wreak havoc with established judicial practices in that it would allow public access to all phases of the administration of justice, including chambers conferences .... Since we do not read section 10 in absolute terms, we need not address this ..."); State v. Angevine, 104 Wash. 679, 682, 177 P. 701 (1919) (in prosecution of reporter for false and misleading reporting of a judicial proceeding, the Information states that the rape trial could not be held "in chambers (meaning in the privacy of the judge's personal quarters), because such proceeding would have been violative of the constitutional rights of the defendant").

dictionary definitions of "chambers" proceedings.[15] It also conflicts with numerous decisions of other jurisdictions, consistently characterizing "chambers" proceedings as closed or private.[16] In short, the courts that have even considered this to be an issue have stated that "in chambers" means "in camera" or in private.[17]

2. *Conflict With Orange on Whether In-Chambers Voir Dire is "Closed" in the Constitutional Sense*

The appellate court's decision even conflicts with Orange, which

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[15] http://dictionary.reference.com/browse/chambers ("**chambers** A room in which a judge may consult privately with attorneys or hear cases not taken into court."). In BLACK'S LAW DICTIONARY (8th ed. 2004), the entry for "in chambers" says "see in camera", and the entry for "in camera" reads: "**in camera** (in **kam**-<<schwa>>-r<<schwa>>), *adv. & adj.* [Law Latin "in a chamber"] **1.** In the judge's private chambers. **2.** In the courtroom with all spectators excluded. **3.** (Of a judicial action) taken when court is not in session. -- Also termed (in reference to the opinion of one judge) *in chambers*.").

[16] E.g., Ehrlich v. Grove, 914 A.2d 783, 787 n.3 (Md. Ct. App. 2007); United States v. LM, 425 F. Supp.2d 948 (N.D. Iowa 2006) (court balances factors and closes courtroom for particular proceeding: "Accordingly, the court shall exercise its discretion to conduct the Transfer Hearing 'in chambers,' i.e., closed to the public, including the victims and their families"); NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 20 Cal.4th 1178, 1215, n.34, 86 Cal. Rptr.2d 778, 807, n.34, 980 P.2d 337 (Cal. 1999) ("Finally, courts also have approved the holding of *closed chambers* hearings, or closed courtroom hearings, when trial court findings establish that there is no less restrictive means of accomplishing an overriding interest, such as protection of a continuing law enforcement investigation.") (emphasis added).

[17] Riley v. State, 711 N.E.2d 489, 492 n.5 (Ind. 1999) (""*In camera*" is defined as follows: "In chambers; in private. A judicial proceeding is said to be heard *in camera* either when the hearing is had before the judge in his private chambers or when all spectators are excluded from the courtroom." *Black's Law Dictionary* 760 (6th ed.1990)."); State ex rel. Stecher v. Dowd, 912 S.W.2d 462, 465 (Mo. 1995) ("The term *in camera* means "in chambers" or "in private," Black's Law Dictionary, 760 (6th ed. 1990), and proceedings that are *in camera* are designed to exclude persons who should not be privy to the information to be disclosed.") (emphasis in original); McGuinness v. Dubois, 891 F. Supp. 25 (D. Mass. 1995) ("After all, the phrase "in camera" in reference to judicial or quasi-judicial administrative proceedings usually means in chambers or in private. See BLACK'S LAW DICTIONARY 760 (6th ed. 1990).").

treated the portion of voir dire that was conducted in chambers in that case as being just as closed as the portion of voir dire that was conducted in the courtroom with the door closed and the public excluded. Orange, 152 Wn.2d 795, 801, 812, & Ireland, J., dissenting at 828 ("Much of the jury inquiry during the claimed court closure was conducted in chambers.").

3. *Conflict With Orange, Brightman, Easterling and Press-Enterprise on Whether the Constitutional Test is a Subjective or Objective One*

The appellate court's decision to uphold closure based on a subjective analysis of the judge's decision – i.e., that he sought to avoid juror contamination rather than to keep the proceedings secret from the press or the public – conflicts with the cases collected in the footnote applying an objective test to determine the constitutionality of such closure.[18]

4. *Conflict With Orange and Brightman on Whether The Record Must Reveal a Formal Closure Order and Exclusion of an Identified Member of the Press or Public to Trigger Application of the Courtroom Closure Test*

The appellate court's decision to uphold closure on the ground that

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[18] Press-Enterprise I, 464 U.S. 501; Orange, 152 Wn.2d 795 (closure for a day of voir dire constitutes reversible error even though it was done for overcrowding and possible security reasons rather than to keep proceedings secret from the press or public); Brightman, 155 Wn.2d 506 (courtroom closure during voir dire constitutes reversible error on direct appeal even though it was done to avoid a possible "security" issue rather than to keep proceedings secret); Easterling, 157 Wn.2d 167 (courtroom closure constitutes reversible error despite the fact that it was done to allow one codefendant's counsel to speak more freely rather than to keep proceedings secret from press or public).

there was no formal order of closure or proof that a specifically identified person was excluded, conflicts directly with Brightman, 155 Wn.2d 506, 512-13. In that case, this Court reversed due to courtroom closure despite the fact "that there is no evidence that the court enforced its ruling, there is no record of a written order, and there is nothing else in the record indicating that anyone was denied access to the courtroom." Id.

The appellate court's holding that the lack of formality preceding closure made the "closed" door somehow less closed also conflicts with Orange. In that case, two concurring Justices questioned whether there was a sufficiently formal "order" on the record showing that the courtroom was truly closed to the public. The Orange majority *rejected* this formalistic argument that the absence of an explicit closure order meant that there was no courtroom closure despite closed doors, and proceeded on the basis that de facto closure was closure. Orange, 152 Wn.2d 795, 814 n.2.

The appellate court's decision thus conflicts with the rule, under Orange, that lack of formality – in making findings, asking for objections, or entering an explicit order – is the problem, not the solution.

B. Given the Conflicts Between Division I and Division III, Between Division I and this Court, and the Acceptance of Review on this Issue Already, The Courtroom Closure Issue is One of Exceptional Importance on Which the Lower Courts Will Benefit From Guidance

Given these conflicts and the fact that this Court has already accepted review of the in-chambers voir dire issue in State v. Tony Strode, Wash.S.Ct. No. 80849-0, this is an issue of exceptional importance on which the lower courts will benefit from this Court's guidance.

C. The Appellate Court's Reliance on the Rape Shield Statute to Exclude Relevant Evidence that Phillips Had Sexual Contact With Other Doctors Violated ER 404(b) and the Right to Present a Defense

The trial court admitted extensive evidence that Dr. Momah touched other (uncharged) patients in a sexual manner, under ER 404(b), to show a common scheme of some sort to prove that he initiated and wanted the current alleged touching. Defense counsel offered precisely the same type of evidence concerning Ms. Phillips, the complainant on Count 1, rape – evidence that she touched other doctors in a sexual manner, i.e., that she slept with them, on other occasions, to show that she initiated and wanted the current touching as part of her common scheme for getting drugs.[19] The trial court excluded it and the appellate court

[19] Defense counsel proffered this evidence based on Phillips' prior comments to Dr. Momah that she had slept with other doctors (although she later denied that). 10/25/05

affirmed, citing the rape shield statute, RCW 9A.44.020.

But a state rape shield law cannot trump the constitutional right to present evidence that is relevant and probative of the complainant's motive and bias in a rape case. See generally Boggs v. Collins, 226 F.3d 728, 737 (6th Cir. 2000), cert. denied, 532 U.S. 913 (2001).

The Supreme Court has therefore ruled that it is impermissible to bar defense counsel from cross-examining an alleged rape victim concerning an extramarital relationship when the relationship would have shown the victim's bias or motivation to lie to protect that relationship. Olden v. Kentucky, 488 U.S. 227, 232, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988). The federal appellate courts have similarly ruled that it is unconstitutional to bar admission of portions of a rape victim's diary under a state's rape shield law, where that diary includes comments such as "I'm sick of myself for giving in to them ... I'm just not strong enough to say no to them. I'm tired of being a whore." Lewis v. Wilkinson, 307 F.3d 413 (6th Cir. 2002). Such statements constitute a "particularized attack on witness credibility directed at revealing possible ulterior motives, as well as implying her consent," id., 307 F.3d at 417-18, and hence they are admissible under constitutional guaranties.

VRP:63. Defense counsel argued that the evidence was relevant to show that the sex was consensual and that Phillips had her own purposes for pursing it and motives to lie. Id.

Since the constitution makes such evidence admissible, state rape shield laws cannot restrict the evidence.[20] That is the reason that other state courts have ruled that their rape shield statutes were unconstitutional as applied when used to bar admission of similarly critical evidence of complainant credibility, bias or motive.[21]

The appellate court's decision affirming exclusion of evidence concerning Phillips' use of sexualized conduct with doctors to get drugs conflicts with these cases – especially given the appellate court's simultaneous ruling that Momah's prior use of sexualized conduct with patients was admissible.

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[20] See People v. Hackett, 421 Mich. 338, 348, 365 N.W.2d 120 (1984). People v. Golden, 140 P.3d 1, 4, 5 (Colo App. 2005), review denied, 2006 Colo. LEXIS 568 (2006) (evidence that victim was in "committed romantic relationship" at time of alleged crime admissible despite rape shield statute, because it bore on question of her credibility and possible motive for telling her roommates that she had been sexually assaulted); People v. Cobb, 962 P.2d 944, 951 (Colo. 1998) (evidence of sexual assault victim's prior conduct, relevant to defense theory, not inadmissible under rape shield statute: "While the jury conceivably might have inferred that [the victim] was engaged in an act of prostitution, evidence does not become inadmissible under either Rule 404(b) or the rape shield statute simply because it might indirectly cause the finder of fact to make an inference concerning the victim's prior sexual conduct.").

[21] E.g., Commonwealth v. Black, 487 A.2d 396 (Penn. 1985) (insofar as rape shield law barred demonstration of witness bias, interest or prejudice, it unconstitutionally infringed upon the defendant's confrontation clause rights under state and federal law); Summit v. State, 101 Nev. 159, 697 P.2d 1374 (Nev. 1985) (defendant denied right to confrontation where the proffered use of prior sexual history of complainant was to challenge credibility); State v. Howard, 121 N.H. 53, 426 A.2d 457 (N.H. 1981); State v. Pulizzano, 155 Wis. 2d 633, 456 N.W.2d 325 (Wis. 1990) (probative value of prior sexual abuse of child victim by other adults material to the case and therefore constitutionally protected).

D. Admission of Substantial Evidence of Dr. Momah's Acts With Other Patients Conflicts with *DeVincentis* on the Prerequisites to ER 404(b) Admissibility, Conflicts with *Hudlow* on the Lack of Probative Value of Such Prior Sexual Conduct, and Conflicts With *Estelle v. McGuire*[22] on the Due Process Problem With Admission of Such Evidence

While excluding prior ER 404(b) evidence concerning complainant Phillips' credibility, the trial court admitted substantial ER 404(b) evidence about Dr. Momah's prior sexual acts and comments. See Opening Brief, pp. 16-20, 39-40.

1. The Appellate Court's Decision to Uphold Admission of Such Evidence Conflicts With DeVincentis

Evidence or prior bad *acts* may be admitted under ER 404(b) as evidence of common plan if four prerequisites are satisfied. DeVincentis, 150 Wn.2d at 18. The appellate court's decision that the ER 404(b) evidence in this case was admissible, conflicts with DeVincentis and this list of prerequisites, as explained in the Opening Brief at pp. 40-51, incorporated here by this reference.

2. The Appellate Court's Decision to Uphold Admission of Such Evidence Conflicts With Hudlow's Determination that Prior Sexual History Has No Probative Value on Whether a Current Crime Occurred

The rape shield statute, RCW 9A.44.020, contains a legislative

[22] Estelle v. McGuire, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).

determination that a person's prior sexual history – even his or her prior promiscuous sexual activity – is irrelevant to whether that person should be believed when testifying about sex at another time and place.

Certainly, the statute is limited by its language to "victims." But the reason it has been upheld against constitutional challenge is that prior sexual history is irrelevant to assessing credibility concerning a later sexual encounter, so the defendant loses nothing of value when he loses the ability to offer it. State v. Hudlow, 99 Wn.2d 1.

The appellate court's decision that this evidence was probative in assessing Momah's credibility thus conflicts with this Court's holding in Hudlow that such prior sexual evidence is *not* probative in assessing credibility of a witness concerning a later sexual encounter. Upholding admission because it is offered against the defendant, rather than the complainant, conflicts with Hudlow; violates the Due Process Clause; and conflicts with authority from other jurisdictions.[23]

3. DeVincentis Should be Revisited

In Wright & Graham, *Federal Practice & Procedure – Federal Rules of Evidence*, 22 Fed. Prac. & Proc. Evid. § 5244, the authors use

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[23] E.g., State v. Cotton, 113 Ohio App.3d 125, 680 N.E.2d 657 (1996) (other sexual acts of defendant-medical professional with victims other than those in present case admitted against him under ER 404(b) in prosecution for rape and other sexual crimes; evidence inadmissible under rape shield statute which protects both parties against admission of sexual history evidence concerning others; convictions reversed).

DeVincentis as the poster-child example of "misuse" of the doctrine of common scheme or plan.[24] They use it again as an example of courts that have a problem distinguishing permissible uses of the common plan exception from impermissible ones. Id., n. 19.1. DeVincentis should be re-evaluated, as discussed in more detail in Opening Brief, pp. 53-57.

Application of the DeVincentis test in this case also violates Due Process Clause protections.[25]

E. The Appellate Court's Decision Upholding Denial of Severance Violated CrR 4.3, 4.4, and the Due Process Clause, Given the Separate Victims, Separate Acts, Distinct Defenses, and Prejudice Posed by Joinder of Count 1, Rape, With Other Counts

Dr. Momah was entitled to severance to avoid prejudice on Count 1, rape, involving the defense of consent, from the unrelated charges of

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[24] Id., n. 6 (citing DeVincentis and commenting, "use of similar mode of approaching child in both crimes; no question of identity so could only be used to prove the defendant did molest child by inference to his character as a pedophile though court manages to convince itself otherwise").

[25] Estelle v. McGuire, 502 U.S. 62, 70, 75, n.5, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) ("... we express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime."). Garceau v. Woodford, 275 F.3d 769 (9th Cir. 2001), rev'd on other grounds, 538 U.S. 202 (2003) (using other crimes evidence to infer propensity to commit current crime violates due process; granting writ of habeas corpus; reversed for unrelated reasons; on remand, dismissed due to death of habeas petitioner); Tucker v. Makowski, 883 F.2d 877, 878, 881 (10th Cir. 1989) (improper admission of "other crimes" evidence rose to level of due process violation); United States ex rel. Lee v. Flannigan, 884 F.2d 945, 953 (7th Cir. 1989), cert. denied, 497 U.S. 1027 (1990). Cf. State v. Bartholomew (Bartholomew II), 101 Wn.2d 631, 639, 683 P.2d 1079 (1984) (consideration of evidence of other crimes of which defendant had not been convicted, at penalty phase, violated cruel punishment and due process protections of state Constitution; holding about reach of state due process clause now questionable).

essentially surreptitious touching during exams. The appellate court's decision to the contrary conflicts with CrR 4.3, 4.4, and the Due Process Clause, as described in more detail in the Opening Brief at pp. 59-63, incorporated by this reference. That decision also fails to appreciate that the potential for prejudice is especially high with such joined sex charges. See State v. Coe, 101 Wn.2d 772, 780-81, 684 P.2d 668 (1984); State v. Bythrow, 114 Wn.2d 713, 718-19, 790 P.2d 154 (1990).

F. The Appellate Court's Decision to Uphold Conviction on the Burns Count, Despite Her Violation of Two Court Orders By Blurting Out Prejudicial Evidence, Conflicts with *Escalona*

Rena Burns was the complainant on Count 4, charging the most serious crime: second-degree rape. Her testimony was strained, contentious, and impeached by numerous prior and in-court inconsistent statements. Yet it formed the basis for the most serious charge, resulting in the lengthiest sentence, against Dr. Momah.

In pretrial hearings, the court excluded two bits of evidence offered only to garner sympathy – the death of one of her twins and her mother's decline and death. 10/19/05 VRP:11-14. Ms. Burns, however, blurted out the inadmissible evidence on both topics. 10/24/05 VRP:109-10; id., VRP:136. The defense objected each time; the objection was sustained and the inadmissible evidence was stricken; but a motion for mistrial (as to

the first violation) was denied. Id., VRP:113-114. The appellate court ruled that these violations caused no prejudice because it was irrelevant, anyway.

This conflicts with Escalona, 49 Wn. App. 251, 254-55, establishing the test for determining whether reversal is required when a witness blurts out excluded evidence. In fact, admission of such highly charged evidence on this most serious count was prejudicial, given the paucity of the state's evidence; the critical importance of Burns' own testimony as the sole witness on this count; and Burns' unbelievable comments throughout, as summarized in the Opening Brief at pp. 69-71.

G. The Appellate Court's Ruling that the Record Did Not Support the Claim that New Evidence Showed that Non-Party Lawyer Mr. Bharti Orchestrated and Suborned Perjury of Complainants Against Dr. Momah, Conflicts with *Brady* and Its Progeny.

Third-party attorney Harish Bharti played a significant role in this criminal prosecution. He represented complainants on the charged counts in this case, the ER 404(b) witnesses, and scores of other former patients of Dr. Momah whose statements he presented to the court at sentencing and in civil lawsuits.[26] This was clear *from the record* in Momah's case;

[26] Shellie Siewert (Ct. 2) (05-2-42073-1 KNT); Carmen Burnetto (Ct. 3) (03-2-36146-1 KNT, dismissed 3/10/05); Rena Burns (Ct. 4) (03-2-37381-8 KNT, dismissed; 05-2-40236-9 KNT, pending); Sheryl Wood (404(b) witness) (03-2-36146-8 KNT, dismissed 6/1/06): Cheryl Reich (404(b) witness) (03-2-36467-3 KNT, dismissed 6/1/06); Karen Perry (404(b) witness) (03-2-36098-8 KNT, dismissed 6/1/06).

Bharti was referred to as the victims' lawyer even by the state.[26]

Given Mr. Bharti's extensive role in orchestrating complainants, any attempts at witness tampering on his part would be relevant to the credibility of the witnesses in Dr. Momah's case. But there is evidence that Mr. Bharti engaged in just such tampering. A recent court order sanctioned Mr. Bharti for his conduct in orchestrating and coaching witnesses, suborning perjury, and lying to the tribunal in a case against Dr. Momah with virtually identical allegations.

The appellate court declined to consider that Order, ruling that the prerequisites to judicial notice had not been satisfied. This Court previously denied interlocutory review of that decision denying judicial notice (see Appendix B). We request review of the Order denying judicial notice again now, as part of this final appeal.

Even if the Order cannot be considered under this Court's "judicial notice" powers, it can certainly be considered per RAP 10.4(h). That rule bars citation of unpublished appellate decisions "as an authority." But

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[26] 9/16/04 VRP (Bharti appears at bail hearing to represent victims); 10/6/05 VRP:46 (state refers to Bharti as Burns' lawyer): 10/18/05 VRP:53 (Siewert says he was her lawyer); 10/18/05 VRP:126 (same, re: Terry); 10/19/05 VRP:74 (same re: Burnetto initially having Bharti as her lawyer); 10/20/05 VRP:93 (Burns says Bharti is her lawyer); 10/24/05 VRP:200 (same, re: Wood); 11/1/05 VRP:41 (same, re: Reich). Mr. Bharti himself spoke to the court and submitted extensive documentation on behalf of complainants in this case. E.g., Sub No. 139[26] (hundreds of pages of sentencing memo); Sub No. 142 (clerk's minutes reflect that Bharti represents victims and witnesses); CP:461-62 (additional sentencing memo submitted by Bharti); CP:470-71 (court order indicating which portions of Bharti filings it will consider).

there is no bar on citation of unpublished decisions of the trial courts.[27] Further, there is no bar on citation of unpublished decisions as something other than a *legal* "authority" – here, to prove up the fact of a sanctions order.

Upon consideration, this Court will find that the Findings of Fact in support of the order of sanctions against Mr. Bharti show that he "knowingly and in bad faith lied to th[e] court" and suborned perjury. See Opening Brief, pp. 73-75. These Findings – combined with the record showing that Mr. Bharti dealt with almost every one of the former patients who testified at Dr. Momah's trial and represented them in civil lawsuits of the same sort as the ones in which the sanctionable conduct occurred – reveal Bharti's role in coaching his client-patients.

The state had an obligation to seek out and disclose such improper conduct possibly tainting its witnesses.[28]

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[27] E.g., Andersen v. King Cy., 158 Wn.2d 1, 154, 138 P.3d 963, 213, n.29 (2006) (Fairhurst, J., dissenting) (in same sex marriage case, citing to unpublished trial court decision from Alaska). See also Dwyer v. J.I. Kislak Mortgage Co., 103 Wn. App. 542, 548-49, 13 P.3d 240 (2000) (imposing sanctions for citation of unpublished decision of Washington Court of Appeals, but not sanctioning the extensive citation of unpublished trial court decisions).

[28] Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); United States v. Perdomo, 929 F.2d 967, 980 (3d Cir. 1991) (government failure to disclose prior arrest and conviction record of main witness was Brady violation requiring reversal; prosecution team with duty to disclose includes both investigative and prosecution personnel); United States v. Osorio, 929 F.2d 753, 760 (1st Cir. 1991) (government erred in failing to disclose that its witness had been involved with trafficking drugs for 18 months prior to trial, even though a

This is true regardless of the fact that Mr. Bharti was not himself a witness because he coached the criminal case witnesses as their counsel and should therefore be considered part of the prosecution team – just like the state Crime Laboratory, even though that is not an arm of the prosecutor;[29] just like independent government agencies separate from the prosecutor's office.[30] In fact, this Court has extended the Brady/Kyles disclosure obligation to outside professionals helping the prosecutor.[31] Mr. Bharti certainly fits into that category.

Since he should be considered part of the prosecution team, the state had an independent duty to seek out and disclose this evidence.[32]

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different A.U.S.A., not the one trying the case, was the one with knowledge of that criminal background).

[29] In re Brown, 17 Cal.4th 873, 72 Cal. Rptr. 2d 698, 702, 952 P.2d 715, cert. denied, 525 U.S. 978 (1988); Damian v. State, 881 S.W.2d 102, 107 (Tex. App. Houston 1st Dist. 1994) (both cited with approval in In re the Personal Restraint of Brennan, 117 Wn. App. 797, 806 n. 17, 72 P.3d 182 (2003)).

[30] United States v. Bin Laden, 397 F. Supp.2d 465, 481 (S.D.N.Y. 2005) (prosecutor has constructive knowledge, for Brady disclosure purposes, of any information held by those whose actions can be fairly imputed to him; WitSec, a separate, independent, government agency for witness protection, falls into that category in this case).

[31] In re Rice, 118 Wn.2d 876, 888, 828 P.2d 1086, cert. denied, 506 U.S. 958 (1992) (treating state-retained psychiatrist, Dr. Harris, as member of prosecution team for Brady analysis, but denying relief because no evidence state knew that he made an arguably exculpatory diagnosis) (for discussion of whether state must have such actual knowledge or not, based on authority decided after Rice, see below); Box v. State, 437 So.2d 19, 25 n.4 (Miss. 1983) (members of prosecution team, for Brady purposes, includes not just police but also prosecution witnesses).

[32] See Opening Brief, pp. 77-81. Withholding this evidence also deprived Dr. Momah of his right to confront and cross-examine witnesses. "The sixth amendment guarantees criminal

VI. CONCLUSION

For the foregoing reasons, review should be granted.

Dated this 3rd day of January, 2008.

Respectfully submitted,

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Attorney for Petitioner, Charles Momah

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defendants the right to cross-examine adverse witnesses to uncover possible bias and to expose the witness's motivation in testifying." Reiger v. Christensen, 789 F.2d 1425, 1433 (9th Cir. 1986). Cross-examination about adverse witness' motives for testifying – including whether there had been improper coaching – falls within that guaranteed confrontation right. Maryland v. Craig, 497 U.S. 836, 851-52, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990) (being able to determine whether child witness in sex case had been coached is part of confrontation clause right); Coy v. Iowa, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988); United States v. Turning Bear, 357 F.3d 730, 736 (8th Cir. 2004) (same); State v. Vincent, 159 Ariz. 418, 429-30, 768 P.2d 150 (1989) (same). Indeed, even the state has the right to cross-examine about whether a witness was coached by a lawyer, since it is so critical to evaluating credibility. State v. Delarosa-Flores, 59 Wn. App. 514, 516-17, 799 P.2d 736 (1990), review denied, 116 Wn.2d 1010 (1991) (even prosecution has right to cross-examine about whether witness was coached, citing Geders v. United States, 425 U.S. 80, 89, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976)).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 23rd day of January, 2008, a copy of the AMENDED PETITION FOR REVIEW was served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 58004-3-I
Respondent,	)	DIVISION ONE
v.	)	
DR. CHARLES MOMAH,	)	PUBLISHED IN PART
Appellant.	)	FILED: November 13, 2007

COX, J. — Dr. Charles Momah appeals his judgment and sentence based on convictions of rape and indecent liberties involving several of his medical patients. We hold that he has failed to carry his burden to show that the trial court violated his constitutional right to a public trial by the manner in which the court conducted voir dire of potential members of the jury who were questioned individually. The court did not abuse its discretion by admitting evidence of certain of Dr. Momah's prior bad acts under the common scheme or plan exception. Likewise, the court did not abuse its discretion by excluding evidence of alleged prior bad acts of one of the witnesses against Dr. Momah. The court properly exercised its discretion in denying Dr. Momah's motion to sever. And the court did not abuse its discretion in denying his mistrial motion. We affirm.

Dr. Momah was a gynecologist and purported fertility specialist with

offices in Burien and Federal Way. In 2003, one of his patients, H.P., went to a hospital and reported that Dr. Momah had raped her. Once the allegations were made public, many other women came forward with complaints that Dr. Momah had sexually abused them. These allegations became the subject of extensive media coverage.

After investigation, the State charged Dr. Momah with seven counts arising from these incidents. Three of the counts were severed from the trial in this case. The remaining four counts were tried in this action, including two counts of indecent liberties, one count of second-degree rape, and one count of third-degree rape.

Due to the nature of the charges and the extensive media coverage, a large number of potential jurors were called for voir dire by the parties and the court. Some of the potential jurors asked to be questioned individually, and the court and both counsel agreed to honor those specific requests. Some jurors had been exposed to media coverage about the case, also requiring individual juror questioning to avoid jury contamination. We discuss in more detail later in this opinion how voir dire was conducted.

Following the selection of the jurors and alternates, the matter was tried over the course of 15 trial days. The jury found Dr. Momah guilty as charged.

He appeals.

RIGHT TO PUBLIC TRIAL

Dr. Momah argues that the trial court violated his right to a public trial by

the manner in which it conducted voir dire of the prospective jurors who were questioned individually. Because he fails in his burden to show there was a constitutional violation in this case, we disagree.

Article I, section 22 of the Washington State Constitution guarantees criminal defendants the right to a speedy, public trial. Similarly, article I, section 10 provides that "[j]ustice in all cases shall be administered openly . . . ." These rights extend to jury selection, which is essential to the criminal trial process.[1]

To protect these rights, a court faced with a request for a trial closure must weigh five factors, referred herein as the Bone-Club factors, to balance the competing constitutional interests.[2] To overcome the presumption of openness, the party seeking closure must show an overriding interest that is likely to be prejudiced and that the closure is narrowly tailored to serve that interest.[3] The trial court must consider alternatives and balance the competing interests on the record.[4]

This test mirrors the one articulated by the United States Supreme Court to protect the Sixth Amendment right to a public trial and the First Amendment

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[1] In re Pers. Restraint of Orange, 152 Wn.2d 795, 804, 100 P.3d 291 (2004).

[2] Id. at 805-07 (quoting State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995)).

[3] Id. at 806 (citing Waller v. Georgia, 467 U.S. 39, 45, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984); Press-Enter. Co. v. Superior Court of Cal., 464 U.S. 501, 510, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)).

[4] Id.

right to open hearings.[5]

We look to the plain language of the closure request and order to determine whether closure occurred, thus triggering the Bone-Club factors.[6]

Once the reviewing court determines there has been a violation of the constitutional right to a public trial right, "[p]rejudice is presumed," and a new trial is warranted.[7]

On the other end of the spectrum from a full closure is a trial court's inherent authority and broad discretion to regulate the conduct of a trial.[8] Thus, a "closure" in which one disruptive spectator is excluded from the courtroom for good cause will not violate the defendant's right to a public trial even absent an analysis of the Bone-Club factors.[9] Likewise, limited seating by itself is

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[5] Id. (citing Waller, 467 U.S. at 45-47).

[6] Orange, 152 Wn.2d at 808; Bone-Club, 128 Wn.2d at 261; State v. Brightman, 155 Wn.2d 506, 516, 122 P.3d 150 (2005); see also Orange, 152 Wn.2d at 823 (Madsen, J., concurring) ("[I]n order to determine whether a trial closure violates the constitutional standard applicable to the open trial guaranty, a reviewing court must consider . . . the language of the closure ruling . . . ."); United States v. Shryock, 342 F.3d 948, 974 (9th Cir. 2003) ("The denial of a defendant's Sixth Amendment right to a public trial requires some affirmative act by the trial court meant to exclude persons from the courtroom.") (quoting United States v. Al-Smadi, 15 F.3d 153, 155 (10th Cir. 1994)).

[7] Orange, 152 Wn.2d at 814 (quoting Bone-Club, 128 Wn.2d at 261-62 and citing State v. Marsh, 126 Wash. 142, 146-47, 217 P. 705 (1923); Waller, 467 U.S. at 49 & n.9)).

[8] See State v. Gregory, 158 Wn.2d 759, 816, 147 P.3d 1201 (2006).

[9] See id.

insufficient to violate the defendant's public trial right.[10]

Here, Dr. Momah focuses his argument exclusively on the events of October 11, 2005, the second day of voir dire. It is undisputed that he neither bases his argument on any other day of voir dire nor does he object to voir dire for reasons other than those described below.[11]

On the second day of voir dire, the court convened the trial in Room E-942, the presiding courtroom in the King County Courthouse.[12] During the prior day of voir dire, 48 potential jurors were excused, leaving 52 potential jurors to be examined further.[13] The record reflects the following exchanges between the court and counsel for the parties regarding questioning of the remaining potential jurors:

> THE COURT: . . . I made a list of jurors who wanted to have private questioning about various issues. On that list I have eight jurors who wanted private questioning.
>
> . . . .
>
> MR. ALLEN [counsel for Dr. Momah]: Your Honor, it is our position and our hope that the Court will take everybody individually, besides those ones we have identified that have prior knowledge. Our concern is this: they may have prior knowledge to the extent that that might disqualify themselves, or we have the real concern that they will contaminate the rest of the jury.

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[10] See, e.g., Shryock, 342 F.3d at 974, cited in Brightman, 155 Wn.2d at 517.

[11] Appellant's Opening Brief at 26-27.

[12] Report of Proceedings (Oct. 11, 2005) at 2.

[13] Id.

. . . .

MR. ROGOFF [counsel for the State]: I agree.[14]

Thereafter, the court divided the prospective jurors who were to be questioned individually into two groups, the first group of 20 to be questioned that morning. The rest were released with instructions to return for questioning that afternoon.

Shortly after the release of the potential jurors, the record reflects that the court, both parties' counsel, Dr. Momah, and the court reporter moved into chambers adjoining the presiding courtroom. Once in chambers, the record states:

> THE COURT: We have moved into chambers here. The door is closed. We have the court reporter present, as well as all counsel and the defendant, along with the Court and juror number 36. . . .[15]

Following questioning by counsel and the court, prospective juror number 36 left chambers and prospective juror 2 entered chambers. The record does not reflect whether the door to chambers was closed during this questioning or subsequent individual questioning of other prospective jurors during the morning session.

The court recessed for lunch and reconvened in room West 813 of the King County Courthouse for the afternoon session. The record reflects the

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[14] Report of Proceedings (Oct. 11, 2005) at 2, 4.

[15] Id. at 19-20.

following statement by the court prior to the arrival of the second group of prospective jurors:

> THE COURT: I guess we have twenty folks outside in the hall. What I propose to do is have them come into the courtroom, we will move to the jury room for the individual questioning, and question them one at a time. I thought about having them in the jury room, but there is [sic] only 16 chairs. Secondly, we reserved 50 jurors for tomorrow.[16]

After further colloquy between the court and counsel, the prospective jurors entered the courtroom. The trial judge explained to the group that individual questioning would continue and then adjourned to the jury room with the lawyers for both parties, Dr. Momah, and the court reporter. The record does not reflect whether the door to the jury room was open or closed during any of the individual examinations of the prospective jurors that afternoon.

Court adjourned for the day at 3:10 p.m., after prospective juror number 41 left the jury room.

Dr. Momah makes two main arguments. First, he argues that this record establishes that the trial court closed voir dire, infringing on his right to a public trial. Second, he argues that this record supports the view that the burden of proving there was no closure and that the requirements of Bone-Club and its progeny were fulfilled shifted to the State. We disagree with both of these arguments.

Nowhere in this record is there any evidence that the trial judge expressly

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[16] Id. at 105.

closed voir dire to the public or the press in violation of any of the controlling cases. Rather, the record expressly shows that the court, in response to the express request of Dr. Momah, agreed to allow voir dire by individual questioning of prospective jurors who indicated prior knowledge about the case. Significantly, his request was based on the concern that prospective jurors might have knowledge about the case that could disqualify them or that they might contaminate the rest of the prospective jurors with such knowledge. In addition, the court and the parties agreed to individually question jurors in response to their express requests. The State agreed that individual questioning was best to avoid the risk of a mistrial due to certain matters that are not relevant to our analysis in this case. There simply is no indication in the record that individual questioning was for the purpose of excluding either the press or the public from this trial.

We note also that there is nothing in the record to indicate that any member of the public (including members of Dr. Momah's family) or the press was excluded from voir dire. The court reporter in this case scrupulously recorded everything that took place during the morning session from the time the trial judge, both parties' counsel, Dr. Momah, and the court reporter went into chambers adjacent to the presiding courtroom. Similarly, the court reporter also scrupulously recorded all that took place from the time the trial judge, counsel, Dr. Momah, and the court reporter went into the jury room in room West 813 after the noon recess. Other than the entry and exit of the individual jurors and

the questioning that ensued for each, there is nothing in this record indicating any attempt by either the press or the public (including members of Dr. Momah's family) to gain admittance to witness voir dire. We simply do not know what would have happened if such an attempt had been made either during the morning or afternoon sessions of voir dire. We will not speculate on whether the trial court would have ordered closure if any attempt had been made by anyone to join the judge, counsel, Dr. Momah, and the court reporter in chambers or in the jury room.

Dr. Momah relies on the seminal Washington cases on courtroom closure. But the closures in each of those cases are distinguishable in important respects from the October 11 day of voir dire in this case.

In State v. Bone-Club, the trial court "ordered closure" of the courtroom by stating, "All those sitting in the back, would you please excuse yourselves at this time."[17] In discussing whether the defendant could have waived his rights, the supreme court noted, "The ***motion to close***, not Defendant's objection, ***triggered the trial court's duty to perform the weighing procedure.***"[18]

Similarly, in In re Personal Restraint of Orange, the trial court ordered closure by the following statement:

> *I am ruling* no family members, no spectators will be permitted in this courtroom during the selection of the jury because of the limitation of space, security, etcetera [sic]. *That's my ruling.*[19]

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[17] 128 Wn.2d 254, 256, 906 P.2d 325 (1995).

[18] Id. at 261 (emphasis added).

[19] 152 Wn.2d 795, 802, 100 P.3d 291 (2004) (emphasis and editorial

The supreme court examined the "***plain language of its ruling***" in order to determine that the trial court had effectuated a permanent, full closure of the courtroom that day, thus requiring an analysis of the Bone-Club factors.[20]

In State v. Brightman, the trial court told the attorneys in a pre-trial proceeding to:

> tell the friends, relatives, and acquaintances of the victim and the defendant that the first two or three days for selecting the jury the courtroom is packed with jurors, they can't observe that.[21]

Although the supreme court did not inquire whether this order had actually been enforced, it emphasized that the court in Orange looked "*solely to the transcript of the trial court's ruling*" to determine whether the order constituted a closure.[22] The court went on to hold:

> ***[O]nce the plain language of the trial court's ruling imposes a closure***, the burden is on the State to overcome the strong presumption that the courtroom was closed.[23]

In this case, the trial court simply never ordered that the proceeding be closed to any spectators or family members. Looking to the plain language of the transcript, as these cases require us to do, it is apparent that no statement or

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comment in original).

[20] Id. at 808 (emphasis added).

[21] 155 Wn.2d 506, 511, 122 P.3d 150 (2005).

[22] Id. at 516 (emphasis in original).

[23] Id. (emphasis added).

order by the trial court triggered application of the Bone-Club factors or shifted the burden to the State to prove that the proceeding was open. Rather, the trial court and both parties' counsel recognized the space constraints and the need to question jurors individually. The court concluded that the only way to accommodate these concerns was to leave the jury venire in the courtroom and conduct individual juror questioning in the only other available room — chambers — that was available during the morning session. Similar analysis applies to the court's use of the jury room during the afternoon session in Room West 813 of the King County Courthouse. Nothing in the trial court's language or actions indicates that any member of the public, aside from the other members of the jury venire, were excluded from this proceeding.

The other cases on which Dr. Momah relies are also distinguishable for the same reasons. For example, in NBC Subsidiary (KNBC-TV), Inc. v. Los Angeles County Superior Court, "the public and the press were ushered out of the courtroom" in response to one of the trial court's closure orders.[24]

Relying on the NBC case, Dr. Momah argues that all proceedings conducted in chambers are per se closed to the public. But the court in that case actually concluded that "although in ***some situations*** it may be appropriate to exclude the public and the press from chambers proceedings," those proceedings are still part of the trial process, subject to the same rules for closure.[25]

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[24] 20 Cal. 4th 1178, 1186, 86 Cal. Rptr. 2d 778 (1999).

The dictionary definitions and other cases Dr. Momah cites likewise do not establish that a proceeding is automatically closed to the public if it occurs in chambers. They are mere observations that proceedings in chambers are often closed to the public. Moreover, we conclude that the trial court's statement in this case, "We have moved into chambers here. The door is closed," was also nothing more than an observation. Of course, a "door" to a courtroom being closed, which occurs in most court proceedings, is not the same as a "proceeding" in that courtroom being closed to the public.

Dr. Momah also relies on a recent case from Division Three, State v. Frawley.[26] We decline to follow that case.

There, the court reversed Frawley's conviction and remanded for a new trial based on the fact that one day of voir dire was conducted in chambers, outside Frawley's presence. It is unclear from the facts of that case whether any member of the public or press was actually prevented from watching the proceedings, but it appears from the opinion that the parties were concerned about questioning jurors while other members of the public were present.[27]

In contrast, Dr. Momah was present both in chambers and in the jury room for the October 11 day of voir dire. Another distinction is that the trial court and

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[25] Id. at 1215.

[26] 167 P.3d 593 (Wn. App. 2007).

[27] See id. at 599 (Brown, J., dissenting) (noting that Frawley's agreement with the chambers questioning was based on his preference that potential jurors be questioned outside the presence of the public).

the parties here were concerned with questioning potential jurors out of the presence of the rest of the jury venire, not the public or press. Their failure to mention the public or press implies that they did not intend on excluding either from observing voir dire.

To the extent that Frawley holds that all in-chambers proceedings are per se closed to the public, we decline to follow Division Three's reasoning in that case.

To summarize, Dr. Momah has failed to carry his burden to show that the trial court closed his trial, depriving him of his constitutional right to a public trial. Accordingly, we do not reach whether any closure was justified under the standards stated in Bone-Club and subsequent cases.

We affirm the judgment and sentence.

The remaining issues of this opinion are not of precedential importance. Accordingly, the remainder of this opinion is not published.[28]

CHARACTER EVIDENCE

Dr. Momah next argues that the trial court abused its discretion in admitting testimony of three witnesses that Dr. Momah had allegedly sexually abused in the past. Conversely, Dr. Momah argues that the trial court erred in declining to admit evidence that victim H.P. had allegedly consented to sex with another doctor in the past. We reject both arguments.

Evidence of a person's character, trait, or prior bad acts is generally

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[28] See RCW 2.06.040.

inadmissible to prove that he acted in conformity with a bad character trait.[29] But evidence of other crimes, wrongs, or acts may be admissible for other purposes, such as proof of a motive or a plan. Before admitting such evidence, a trial court must:

> (1) identify the purpose for which the evidence is sought to be introduced, (2) determine whether the evidence is relevant to prove an element of the crime charged[,] and (3) weigh the probative value of the evidence against its prejudicial effect.[30]

The potential for prejudice from prior bad acts is highest in sex offense cases.[31]

The common scheme or plan exception allows proof that the defendant devised a plan to repeatedly commit separate but very similar crimes against similar victims under similar circumstances.[32] It requires proof that the prior acts are:

> (1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common plan or scheme, (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more probative than prejudicial.[33]

Under this type of plan, there must be a high level of similarity between the acts, "such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual

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[29] ER 404(a)(1), (b).

[30] State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

[31] State v. Ramirez, 46 Wn. App. 223, 227, 730 P.2d 98 (1986).

[32] Lough, 125 Wn.2d at 855.

[33] Id. at 852.

manifestations."[34]

Although the prior acts must be markedly similar to the charged acts, the common scheme or plan exception is to be distinguished from the modus operandi exception, which requires highly unique and identical circumstances (often referred to as signature crimes) to prove the suspect's identity.[35] Under the common scheme or plan exception, the acts must be highly similar, but not identical or unique.[36]

For example, a common scheme or plan existed in State v. DeVincentis when the defendant molested two children in similar ways.[37] In both circumstances, he befriended young girls, desensitized them by wearing almost no clothing around the house, asked the victims to remove their clothes, and asked them to perform the same sexual act on him.[38]

And in State v. Lough, a common scheme or plan was proved by the testimony of four women who were in a personal relationship with the defendant, a paramedic. The women each stated that the defendant offered her a drink or medication of some kind that rendered her unconscious, and then raped her.[39]

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[34] State v. DeVincentis, 150 Wn.2d 11, 19, 74 P.3d 119 (2003) (internal quotations omitted), habeas corpus denied by DeVincentis v. Quinn, No. C06-680-JLR, 2007 WL 1059304 (W.D. Wash. April 5, 2007).

[35] See id. at 21 (noting the importance of this distinction).

[36] Id.

[37] 150 Wn.2d 11, 74 P.3d 119 (2003).

[38] Id. at 16.

Washington's rape shield statute also addresses the admissibility of prior sexual acts. But that statute applies to victims, not criminal defendants.[40] It prohibits the admission of evidence of a victim's prior sexual history on the issue of credibility under any circumstances.[41] One purpose of the statute is to prevent the jury from relying on the illogical premise that a woman who consents to sex is unchaste, and such an unchaste woman is more likely to consent to sex again in the future.[42]

Under the statute, a trial court may admit evidence of a victim's prior sexual acts as relevant to the issue of consent, not credibility, if the probative value of the evidence substantially outweighs its prejudicial effect, and its exclusion would deny substantial justice to the defendant.[43] Evidence of a victim's past sexual behavior is only relevant to the issue of consent if the circumstances of the past acts of consent were similar to those alleged by the defendant.[44] To have such evidence admitted, a defendant must file a written pretrial motion accompanied by affidavit, stating the offer of proof.[45]

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[39] Lough, 125 Wn.2d at 850.

[40] RCW 9A.44.020(2).

[41] RCW 9A.44.020(2); Gregory, 158 Wn.2d at 789.

[42] State v. Hudlow, 99 Wn.2d 1, 10, 659 P.2d 514 (1983).

[43] RCW 9A.44.020(3)(d).

[44] Hudlow, 99 Wn.2d at 11.

[45] RCW 9A.44.020(3)(a), (b).

Decisions as to the admissibility of evidence are within the discretion of the trial court, and are reversible only for abuse of that discretion.[46] A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds.[47] We may affirm on any ground supported by the record even if the trial court did not consider the argument.[48]

Dr. Momah's Prior Bad Acts

We conclude that the trial court did not abuse its discretion in admitting testimony of Dr. Momah's alleged acts against other women.

Here, after reviewing the relevant elements and case law, the trial court ruled that the testimony of K.T., C.W., and C.R. was admissible to prove a common scheme or plan. Based on stipulation by the parties, the court found that the acts occurred by a preponderance of the evidence. The court ruled that the testimony of each of the four charged victims and these three additional witnesses was relevant and not outweighed by its prejudicial effect.

This was not an abuse of the trial court's discretion. The testimony of all seven women, taken together, illustrates Dr. Momah's plan to use his special position of power as a gynecologist to sexually take advantage of his most vulnerable patients.

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[46] State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

[47] State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

[48] State v. Michielli, 132 Wn.2d 229, 242-43, 937 P.2d 587 (1997).

He convinced each woman that he could help her with her specific problem, making her feel that she had few other options. Each victim testified about a particular vulnerability known to Dr. Momah. For instance, H.P., K.T., C.W., C.R., and S.S. were to some extent dependent on the narcotics or other medications he prescribed to them. Similarly, S.S., K.T., and C.W. experienced severe pain, requiring medication from Dr. Momah. H.P., C.B., and C.W. used medical coupons and relied on Dr. Momah's generosity with respect to payment for services. C.B., R.B., and C.W. desperately wanted to become pregnant, and R.B. and C.W. believed Dr. Momah's promises that he could enable them to get pregnant when other doctors could not.

Once he had gained their trust, he began acting inappropriately. Most of the victims testified that Dr. Momah did not wear gloves or have assistants present during examinations. Many testified that at some appointments, no receptionists or assistants were present in the entire office. Dr. Momah personally called many of the women on the phone throughout their doctor-patient relationships. He performed manual exams and ultrasounds at every, or almost every, appointment with these women, even when the sole purpose of the appointment was to obtain another prescription for the same symptoms or condition.

Finally, he abused their trust by sexually taking advantage of them, usually while they were on the examination table. For example, he made sexually inappropriate comments to all of the women or asked them on dates.

He touched all of the women except C.R. in a sexual manner. He used the ultrasound wand in a sexual manner with R.B. and C.B. He had sexual intercourse with H.P. on the examination table.

These acts occurred on multiple occasions for many of these women. If the women objected, he usually became angry or gruff, told them not to tell, threatened them, or told them that no one would believe them.

Each of these acts was proved by a preponderance of the evidence. Each was relevant and cross-admissible to show that the acts against S.S., C.B., and R.B. (Counts II through IV) actually occurred (corpus delicti) because of the similarity of Dr. Momah's acts against the other women. And these non-consensual acts were relevant to rebut Dr. Momah's defense that H.P. consented to have sex with him (Count I).

The evidence was admitted only for the purpose of proving a common scheme or plan, and the jury was so instructed.

Finally, the trial court did not abuse its discretion in concluding that the probative value substantially outweighed any prejudicial effect of the evidence, given the repeated, similar acts Dr. Momah perpetrated on these women. Although the prejudicial effect of prior sex acts can be great, this type of evidence is highly probative given the lack of other evidence available in sex cases.[49]

Dr. Momah argues that what happened to some of the women was too

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[49] DeVincentis, 150 Wn.2d at 25.

dissimilar to be probative. We disagree.

Dr. Momah raped H.P., whereas he only said inappropriate things to C.R. (he did not rape or touch her inappropriately). But the trial court was within its discretion in considering the testimony of all seven witnesses together and concluding that Dr. Momah's acts against them could be explained as manifestations of a single plan to use his status as a gynecologist to sexually abuse his patients while they were at their most vulnerable. To the extent that C.R.'s testimony is less probative of the plan than the other witnesses because Dr. Momah did not touch her sexually, it is correspondingly less prejudicial. Dr. Momah made sexual comments to her the way he did with every other victim, and she testified to no dissimilar facts that could have prejudiced Dr. Momah.

Dr. Momah counters that the time periods the seven women saw him were too varied to be probative. But to the extent that Dr. Momah's inappropriate acts occurred repeatedly over a long period of time, then the passage of time tends to prove, rather than disprove, the existence of a common scheme or plan.[50] To the extent that the women testified that things went normally during their earlier relationship with Dr. Momah and then got worse in recent years, then remoteness is not an issue.

Dr. Momah argues that since rape is a strict liability crime and has no intent element, evidence of a common plan is irrelevant to proving intent. He

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[50] See Lough, 125 Wn.2d at 860 (repeated acts over a period of time are probative of common scheme or plan, whereas remoteness in time between acts may lead to a conclusion that the acts are dissimilar).

further argues that because he does not deny that he had sex with H.P., corpus delicti is not at issue, so the evidence is irrelevant to proving an element of the crime.

His arguments ignore the valid purpose of the evidence as applied to Count I — to rebut his defense that H.P. consented to the sexual encounter.[51] The lack of consent of numerous other victims under similar circumstances tends to show that H.P. did not consent in this case.

Dr. Momah asserts that Washington's jurisprudence regarding the common plan exception has been highly criticized and eviscerates the rule against propensity evidence. But the Washington Supreme Court in DeVincentis recently refused to overrule the rule as set forth in Lough, and we are bound by that decision.[52]

Finally, Dr. Momah relies on the rape shield statute to argue that his prior sexual acts are not probative of the issues in this case. He argues that the rape shield statute makes clear that prior sexual acts are not probative of either credibility or consent. He misreads the statute. Both the rape shield statute and ER 404(b) allow evidence of prior sexual acts to prove consent under certain circumstances, but never to prove credibility. Under both rules, the prior acts must be similar to the act in question in order to be considered even minimally

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[51] See Williams v. State, 110 So.2d 654 (Fla. 1959) (evidence of a common plan used to rebut the defense of consent in a rape case), cited with approval in Lough, 125 Wn.2d at 857 n.14.

[52] See DeVincentis, 150 Wn.2d at 25.

relevant to the issue of whether the individual consented in this case. Thus, his argument that prior sex acts are never probative is incorrect. In addition, he cannot rely upon the rape shield statute because by its terms, it applies to victims. It was passed in part to encourage victims of sexual abuse to report their crimes.[53] This policy does not apply to him, an accused sexual perpetrator.

Dr. Momah also assigns error to the jury instruction regarding this ER 404(b) evidence for the same reasons he objects to admission of the evidence. Because the instruction properly allowed the jury to consider his alleged acts against all seven women for the proper purposes discussed above, and for no other purpose, it was proper.

H.P.'s Prior Bad Acts

Dr. Momah argues that the trial court abused its discretion in declining to allow evidence of victim H.P.'s alleged prior sexual experiences with doctors. We disagree.

During the State's direct examination of H.P., the parties and the court had a colloquy outside the presence of the jury. The prosecutor mentioned that in Dr. Momah's interview of H.P., he asked her "whether or not [H.P.] told the defendant that she had slept with other doctors."[54] Dr. Momah stated that he

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[53] Hudlow, 99 Wn.2d at 16.

[54] Report of Proceedings (Oct. 26, 2005) at 62.

wished to question H.P. about such incidents. His oral proffer was as follows:

> Your Honor, we are not going to raise it to show — First, I was going to bring it up [on cross] before I asked her that question. But we would be asking the Court for permission to bring it up, because this is something that Dr. Momah tells us she told him. She denied that she told him and denied that it happened, but this is going to be an issue. And I would be asking for that.[55]

The trial court ruled such evidence inadmissible because it was "not relevant."[56]

This non-specific proffer does not meet the requirements of the rape shield statute. Dr. Momah points to no evidence in the record that before trial he made a specific, written offer of proof, supported by affidavit, explaining how the evidence would be relevant to show consent, rather than credibility. He cites no details about these alleged prior acts that would allow the trial court or this court to conclude that the prior acts are similar enough to this case to be relevant to the issue of consent. Thus, the trial court properly denied his request.

Dr. Momah does not dispute that he failed to adhere to the procedural requirements of the rape shield statute. He argues, however, that the statute only applies to the types of prior sexual history listed therein and that H.P.'s alleged prior acts in this case do not fall within that list.

His argument is defied by the plain meaning of the statute, which applies to "Evidence of the victim's past sexual behavior ***including but not limited to***" the items in the list.[57] Because Dr. Momah offered evidence of H.P.'s "past

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[55] Id. at 63.

[56] Id.

[57] RCW 9A.44.020(2), (3) (emphasis added); see also Gregory, 158

sexual behavior," he was required to adhere to the statutory procedures. He failed to do so, and the trial court did not abuse its discretion in rejecting the evidence.

Dr. Momah also argues that the trial court violated his right to present a meaningful defense. But there is no constitutional right to present irrelevant evidence.[58] Evidence of a victim's prior sexual acts is irrelevant to the issue of credibility. It is only relevant to the issue of consent if there are similarities between past acts of consent and the defendant's allegations of consent in this case, making it more likely that the victim consented in this case.[59] Even if minimally relevant, such evidence must be excluded if it is substantially outweighed by its prejudicial effect.[60] The State has a compelling interest in preventing the admission of such evidence when it has a tendency to confuse the jury and interfere with the fact-finding process.[61] Here, Dr. Momah has not shown that the testimony is even minimally relevant, so his right to present a meaningful defense is not implicated.

SEVERANCE

Wn.2d at 783 (rejecting the appellant's argument that prior acts of prostitution are exempted from the statute).

[58] Hudlow, 99 Wn.2d at 15.

[59] See id. at 11.

[60] RCW 9A.44.020(3)(d).

[61] Hudlow, 99 Wn.2d at 18.

Dr. Momah argues that the trial court abused its discretion in denying his motion to sever the four counts tried in this case. We disagree.

Criminal Rule 4.3(a) allows the State to join offenses in one charging document if the offenses:

> (1) Are of the same or similar character, even if not part of a single scheme or plan; or
> (2) Are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

Criminal Rule 4.4 allows the trial court to sever joined offenses if doing so "will promote a fair determination of the defendant's guilt or innocence of each offense." A defendant seeking severance has the burden to show that joinder is so manifestly prejudicial that it outweighs the interest in judicial economy.[62]

We review a trial court's ruling on a motion to sever for an abuse of discretion.[63] We consider such factors as "the jury's ability to compartmentalize the evidence, the strength of the State's evidence on each count, the issue of cross admissibility of the various counts, [and] whether the judge instructed the jury to decide each count separately," and we weigh strongly the concern for judicial economy.[64] Jurors are presumed to follow the trial court's limiting instructions.[65]

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[62] State v. Bythrow, 114 Wn.2d 713, 718, 790 P.2d 154 (1990).

[63] Id. at 717.

[64] State v. Kalakosky, 121 Wn.2d 525, 537, 852 P.2d 1064 (1993).

[65] State v. Johnson, 124 Wn.2d 57, 77, 873 P.2d 514 (1994).

Dr. Momah's argument rests largely on the assumption that he would succeed on the issue of exclusion of character evidence. But as discussed above, testimony about Dr. Momah's prior acts against each of the seven victims was properly admitted against Dr. Momah with regard to each of the four counts. Thus, because all of the testimony was cross-admissible as relevant to prove a common scheme or plan, there was no prejudice in allowing it to be presented in the same trial.

Because of the strong concern for judicial economy and the jury's ability to follow instructions, a defendant seeking severance must make an even stronger showing of prejudice than required to admit ER 404(b) evidence.[66] Therefore, the fact that Dr. Momah could not meet this burden under ER 404(b) illustrates his inability to establish prejudice from joinder of the four counts against him.[67]

Finally, the trial court properly instructed the jury to consider each count separately. The court also instructed the jury that the ER 404(b) evidence should only be considered relevant to a possible common scheme or plan, and for no other purpose. Dr. Momah makes no argument that the jury was unable to

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[66] Bythrow, 114 Wn.2d at 722.

[67] See State v. Smith, 74 Wn.2d 744, 756, 446 P.2d 571 (1968) ("However, since the evidence of the other crimes would have concededly been admissible in separate trials, the defendants were not unduly prejudiced by the joinder."), vacated in part on other grounds by Smith v. Washington, 408 U.S. 934, 92 S. Ct. 2852, 33 L. Ed. 2d 747 (1972), overruled in part on other grounds by State v. Gosby, 85 Wn.2d 758, 539 P.2d 680 (1975).

follow these instructions.

ORDER IN LIMINE / MISTRIAL

Dr. Momah contends that two violations of an order in limine prejudiced his trial and that his mistrial motion should have been granted. We disagree.

The purpose of a motion in limine is to prevent the jury from hearing potentially prejudicial matters.[68] A mistrial should only be granted based on a witness' violation of an order in limine if the defendant is so prejudiced by the violation that nothing short of a new trial would ensure that he receive a fair trial.[69] Jurors are presumed to follow the trial court's limiting instructions.[70] The decision to grant or deny a mistrial is within the sound discretion of the trial court and is reversible only for abuse of that discretion.[71] We should only overturn such a decision if there is a substantial likelihood that the evidence affected the jury's verdict.[72]

Here, the State made a motion in limine to include testimony from victim R.B. regarding traumatic events she had experienced during the period of time relevant to this case. The State wished to use these facts to explain minor

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[68] State v. Austin, 34 Wn. App. 625, 627-28, 662 P.2d 872 (1983), aff'd, State v. Koloske, 100 Wn.2d 889, 676 P.2d 456 (1984).

[69] State v. Harris, 48 Wn. App. 279, 284-85, 738 P.2d 1059 (1987).

[70] Johnson, 124 Wn.2d at 77.

[71] State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994).

[72] Id.

inconsistencies, primarily regarding dates, between her trial testimony and prior statements, and Dr. Momah objected to admission of such testimony. The trial court concluded that, assuming Dr. Momah opened the door by pointing out inconsistencies, the State could elicit that R.B. had an in-vitro fertilization procedure a couple days before one of the relevant interviews, and that her mother died about a month before another interview. She was not allowed to testify that one of her children later died, that her brother was terminally ill, or the specific circumstances surrounding her mother's death.

R.B. testified part of the day Wednesday and part of the day on Thursday. On Monday, she underwent cross-examination all morning. Just before the lunch hour, defense counsel cross-examined her regarding the order and dates of appointments she had attended, pointing out apparently inconsistent statements. She responded that it was difficult for her to remember exact dates of events that happened long ago, especially since she had other traumatic events in her life. Defense counsel continued as follows:

> Q. What's your birthday? What is your date of birth?
> A. December 30th.
> Q. What year?
> A. 1959. So you are telling me that I am supposed to remember the day and time I am sexually assaulted? I am supposed to remember that today on March 25th, Dr. Momah came and sexually assaulted me, and I am supposed to remember that, because this is the glorifying day that I need to remember? That is a glorifying time in my life? I can remember my daughter's birthday, because you know what, that is a glorifying time in my life. October 24th, 2004 my daughter was born. ***October 14th my son died*** . . . .[73]

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[73] RP (Oct. 24, 2005) at 109 (emphasis added).

Defense counsel objected and moved for a mistrial. The trial court denied the motion for a mistrial, but after the lunch break issued a limiting instruction that R.B.'s son died through no fault of Dr. Momah, and the jury should disregard that fact.[74]

Later, on re-cross, defense counsel asked R.B. whether her mother dying led to incorrect statements in her subsequent interview. R.B. responded:

> There could be dates or times that maybe are not exactly right. I mean, just because my mother died on 7/31 of this year — My mother had a massive brain aneurysm at the same time I was being implanted with embryos.[75]

Defense counsel objected, and the court instructed the jury to disregard the statement.

We conclude that the trial court did not abuse its discretion in denying the motion for a mistrial. The circumstances regarding R.B.'s mother and son are entirely irrelevant to this case. True, her credibility in this case was important. But these events in her life were not so prejudicial that the trial court's instructions would have been ineffective. While the fact that her son died and her mother suffered a brain aneurysm may have garnered sympathy with the jury, they were irrelevant to whether she told the truth when she accused Dr. Momah of sexually abusing her.

ADDITIONAL EVIDENCE

Dr. Momah argues that alleged misconduct by a lawyer who represented

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[74] Id. at 121.

[75] Id. at 136.

witnesses in this case in separate civil litigation was prejudicial to his defense. He also claims the alleged misconduct by the civil attorney is chargeable to the State in this case. Because the record before us fails to substantiate this claim, we reject it.

Dr. Momah moved for an order requesting this court to take judicial notice of findings of fact and conclusions of law from a separate court proceeding. According to the motion, that proceeding addressed alleged misconduct of a civil attorney who is not employed by the State.

A commissioner of this court denied the motion, and a panel of this court denied Dr. Momah's motion to modify. The supreme court denied review of our ruling. Thus, the information Dr. Momah sought to bring before this court to support this appeal is not before us. We will therefore not review this claim on appeal.

We affirm the judgment and sentence.

/s/ Cox, J.

WE CONCUR:

/s/ Appelwick, C.J.

/s/ Grosse, J.

APPENDIX B

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
v.
CHARLES MOMAH,
Petitioner.

NO. 79865-6
RULING DENYING REVIEW

A King County jury found Charles Momah guilty of second degree rape, third degree rape, and two counts of indecent liberties. Dr. Momah appealed to Division One of the Court of Appeals. When he filed his opening brief he also moved the Court of Appeals to take judicial notice of findings of fact and conclusions of law and the court's oral ruling in a Pierce County case brought by Perla and Albert Saldivar against Dr. Dennis Momah and the clinic where Dennis Momah saw Ms. Saldivar as a patient. Apparently, the plaintiff's complaint in the Pierce County action was later amended to add Charles Momah as a defendant. A Court of Appeals commissioner denied the motion to take judicial notice by notation ruling, and a panel of Court of Appeals judges later denied Dr. Momah's motion to modify the commissioner's ruling. Dr. Momah now seeks this court's discretionary review. RAP 13.5.

An appellate court will take judicial notice of the record in the case presently before it or in proceedings engrafted, ancillary, or supplemental to it. *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 98, 117 P.3d 1117 (2005). But the court cannot, when deciding one case, take judicial notice of records

of other independent proceedings even though they are between the same parties. *Id.* And even though ER 201 states that certain facts may be judicially noticed at any stage of proceedings, RAP 9.11 restricts appellate consideration of additional evidence on review. *Id.*; *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 546 n.6, 14 P.3d 133 (2000). The latter rule provides that an appellate court will direct that additional evidence on the merits be taken only if six stringent requirements are met.

The documents of which Dr. Momah requests judicial notice are from a separate proceeding not involving the same parties, the same underlying occurrences, or even the same witnesses. Dr. Momah contends that the State was obliged to notify him of the conduct of attorney Harish Bharti that is the subject of several of the findings and conclusions in the Pierce County action, on the basis that the complainants here were also represented by attorney Bharti, but that does not make the Pierce County action "engrafted, ancillary, or supplementary" to this criminal prosecution. *See Swak v. Dep't of Labor & Indus.*, 40 Wn.2d 51, 53-54, 240 P.2d 560 (1952) (collecting cases taking judicial notice and declining to take judicial notice). Nor does Dr. Momah make any attempt to satisfy RAP 9.11 other than to suggest erroneously that because this evidence does not concern his guilt or innocence, it is not covered by that rule. Plainly, the purpose of relying on this evidence is to convince an appellate court of the merits of Dr. Momah's claim that the State should have divulged attorney Bharti's conduct.

Dr. Momah has thus not justified his request to take judicial notice. His motion for discretionary review is accordingly denied.

Steven C. Goff
COMMISSIONER

March 27, 2007